Filed 3/14/19 Slaughter v. Masserman CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LESA SLAUGHTER, Plaintiff and Appellant, v. DEAN MASSERMAN et al., Defendants and Respondents.	B282420 (Los Angeles County Super. Ct. No. BC599514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Beaudet, Judge. Affirmed.

Daehnke Stevens, Stevens Law, Margaret P. Stevens, for Plaintiff and Appellant.

Thompson Coe & O'Meara, Stephen M. Caine and Frances M. O'Meara, for Defendants and Respondents.

Plaintiff Lesa Slaughter (Plaintiff) retained Dean Masserman (Masserman) of the law firm Vorzimer Masserman, APC (collectively, Defendants) to represent her in her divorce. Plaintiff and her ex-husband (Ex-Husband) agreed to a stipulated judgment entered in January 2014, but disputes among the parties concerning its terms broke out almost immediately. By April 2014, plaintiff told opposing counsel she would proceed in propria persona, took possession of her client file, and told defendants she needed a notice of withdrawal from them. More than a year later, on October 30, 2015, plaintiff filed a legal malpractice complaint against defendants. We consider whether the one-year statute of limitations applicable to a legal malpractice claim was tolled under what is sometimes called the continuing representation rule—because, as plaintiff argues, defendants (1) acquiesced in a continued sporadic correspondence with her and opposing counsel and (2) had not fully disbursed all client funds.

I. BACKGROUND

A. Plaintiff's Divorce and Subsequent Disputes with Ex-Husband

Plaintiff is an attorney who has been admitted to practice in California for almost 20 years. In June 2013, she retained defendants to represent her in her divorce case filed in Los Angeles Superior Court. Masserman was the partner primarily responsible for the firm's representation of plaintiff.

The parties executed a retainer agreement that provided defendants would perform legal services in connection with "the dissolution of the marriage and ancillary issues." The agreement

further provided plaintiff could discharge defendants at any time, while defendants could withdraw at any time with reasonable written notice to plaintiff.

The parties attended a mediation session in December 2013 and agreed to settle the case. Plaintiff and Ex-Husband filed a stipulated judgment in early January 2014, which the court entered at the end of the month.

By February of that year, however, a dispute arose over Ex-Husband's responsibility for certain household expenses under the judgment. In exchange for a one-time fee of $350—the last work for which defendants charged plaintiff—Masserman corresponded and spoke with Ex-Husband's attorney, Mary Catherine Bohen (Bohen). Later that month, plaintiff and Masserman exchanged emails and Masserman suggested plaintiff represent herself in light of disagreements that had arisen between the two of them: "Obviously you do not agree and there is a simple solution for that, which is for you to proceed In Pro Per. I have already far exceeded the $350.00 you paid me in writing this letter, speaking with [Bohen] and responding to your emails. More importantly, I want to maintain a positive relationship with you and feel that our styles and opinions differ too greatly for me to continue." Masserman's email added that defendants would "be filing to Request to be relieved as counsel. Because the final judgment has been entered it need not be a substitution signed by you, nor is a motion required. It is simply a document we file with the court. I will provide you a copy for your records. I will also prepare your file to be picked up so you have everything necessary in the event something arises in the future."

The following month, on March 26, 2014, plaintiff sent an email to Bohen that stated, among other things, "Masserman is no longer my attorney, and I write to you pro per." About a week later, on April 4, 2014, plaintiff took custody of her case file from defendants, and it is undisputed that defendants did not retain a copy. Then, on April 25, 2014, plaintiff sent an email to Masserman (and his legal assistant) complaining she and Masserman had not "connected in the past few weeks" and she was "unable to wait any longer for a complete bill reflecting all payments" to defendants. Plaintiff also stated she "never received a copy of [Masserman's] withdrawal as counsel of record and need[ed] that as well." In response, Masserman explained they had "not connected" because plaintiff said she would reschedule a cancelled call but never did. He disputed the bulk of the billing discrepancies identified by plaintiff and, with respect to the notice of withdrawal, explained: "[Y]ou have not received it because I did not file it. I have been very busy. Sorry." Masserman ended the email by asking plaintiff to let him know how she wanted to proceed.

The appellate record does not include further communications between Masserman and plaintiff or Bohen until the end of October 2014, when Bohen wrote to Masserman regarding the custodial schedule for plaintiff and Ex-Husband's children. Bohen's email said, "If you are no longer acting as [plaintiff's] counsel, please let us know and we will direct our communications directly to [her]." Masserman called Bohen to tell her defendants "would no longer be [plaintiff's] counsel" and confirmed that, "since March 2014, [plaintiff] had actually . . . been taking steps as her own counsel, in pro per, by contacting [Bohen] directly regarding her husband's performance

under the Judgment." At Bohen's request, Masserman formally filed a notice of withdrawal the next day, October 30, 2014.

A few days after that, Bohen sent an email to plaintiff advising she had received defendants' notice of withdrawal and inquiring about the custody issue. Plaintiff responded, stating: "Mr. Masserman was dismissed as my counsel in early 2014. I have asked that he file a withdrawal of counsel many many months ago. [¶] Moreover, I made it quite clear to you that Mr. Masserman was no longer my counsel on this matter several months ago via our multitude of emails dating back to the spring of 2014 . . . . So why you went through the effort of sending any information to Mr. Masserman is a surprising error that is uncharacteristic of your attention to detail." When Bohen replied that she sent the letter to Masserman because he was still counsel of record, plaintiff again corrected the record: "You were informed Mr. Masserman was no longer my attorney of record on March 26 via e-mail, to which you responded, and continued to correspond directly and only with me from March to May regarding various issues concerning the judgment. [¶] Therefore, you either had a number of ex-parte communications with a party represented by counsel during that time, or you have made a mistake on addressing a letter regarding the judgment to an attorney no longer representing the opposing party with the hope I will incur legal fees, which I have not. [¶] It would be ill advised for me to respond to any correspondence from you, which is not addressed to me given I am pro-per."

According to a declaration later prepared by plaintiff in the context of this malpractice action, Masserman "continued to advise [her] regarding various post-judgment issues and advised [her] regarding a visitation proposal" even after he filed the

notice of withdrawal. These particular communications are not documented in the record other than plaintiff's declaration, and plaintiff does not elaborate on their timing or nature.

Almost six months later, in April 2015, plaintiff copied Masserman into an ongoing email discussion with Bohen regarding communal liabilities that were not included in the stipulated judgment. Masserman sent an email to Bohen, copying plaintiff, in which he explained: "For what it's worth, I do recall seeing [a particular bill] back when we were discussing the bills, and I recall sending everything to your office for inclusion in the final judgment. I also recall us carving out some of the bills that [Ex-Husband] refused to be responsible for, but not that particular provider, whose services related to [plaintiff's] back surgery. Based thereon, I can only assume that provider was omitted in error. Please feel free to refresh my memory if your recollection differs from mine. I hope this helps the parties resolve the matter amicably." When Bohen said she had no record of having received the bill at issue, Masserman indicated he would investigate further: "I'll see what I can find. I am really going by recollection at this moment. I am at somewhat of a disadvantage. When [plaintiff] took over her case I released her entire file to her and did not retain a copy for myself. . . . I will let both of you [i.e., plaintiff and Bohen] know what I come up with, if anything."

A couple weeks after this exchange, plaintiff sent Masserman what she described as "documentation showing transmission of the [communal liability] information[ ] before the judgment was executed" and asked Masserman to contact Bohen. Masserman replied to plaintiff's email stating: "I am sensitive to the fact litigating this matter yourself may be difficult, and that

[Bohen] is stubborn. You apparently have hit a wall with her and perhaps think that if I intervene I may have more success. However, I no longer represent you, at your request, and [Bohen] has no reason or obligation to negotiate with me. As a favor to you I did write that letter,[1] and I followed it up with a phone call with [Bohen]." Masserman informed plaintiff that Bohen "had no interest in further discussing your case with me as I am not your attorney, and have no authority to act in that capacity."

Masserman's reply email to plaintiff also addressed financial concerns plaintiff had apparently raised. Masserman's reply stated: "[Y]ou still have a credit of $1,146.19 with this office, based upon our audit of the billing last year at your request. We sent you a couple emails regarding that and heard nothing in return. I would be happy to refund that amount to you today. Please confirm what address you would like the check sent to." Masserman closed the email by proposing plaintiff seek a global resolution of her disputes with Ex-Husband because plaintiff's time was more valuable than the amounts of money at issue and because such a resolution would conclude Bohen's involvement in the case, enabling plaintiff to deal with Ex-Husband directly.

In the latter part of May 2015, plaintiff sent emails to Masserman "[f]ollowing up on [his] agreement to call [Bohen] regarding the judgment and community debts" and, later, "following up again with [him] to see if [Bohen] responded to [Masserman's] e-mail request (or voice mail) asking for what was

---

[1] This appears to be a reference to the April 2015 email concerning Masserman's recollection of bills discussed during the divorce settlement.

paid, how much and when." At the end of June, plaintiff sent another email to Masserman telling him, "I have e-mailed you about three times asking what information you received regarding the payment of community debts." Masserman responded a week later, in July 2015: "I have emailed and spoken with [Bohen] on a few occasions about your request as a courtesy to you. I have pointed out to her that portion of the judgment which requires her office to provide proof of payment of creditors. She has indicated that she will send me an accounting. If and when I receive it I will forward it to you. . . . That said, my involvement in your case is finished. Please understand that, like you, I am extremely busy servicing the clients who have active cases with this office. You took over the handling of this case more than 15 months ago. Despite your opinion that I am somehow responsible for this dispute and have a duty to fix it, I disagree."

B. This Lawsuit

On October 30, 2015, plaintiff sued defendants alleging professional negligence and breach of fiduciary duty. Among other things, the operative complaint alleges defendants did not competently advise her concerning valuation of a community business, did not inform her of her options concerning child support, and did not ensure community debts were reflected in the judgment. She also alleged defendants did not provide regular and accurate billing statements, did not provide a final accounting, and did not obtain her consent before withdrawing funds from a client trust account.

Defendants moved for summary judgment, arguing plaintiff's claims were barred by the one-year statute of

limitations that governs professional negligence claims. In opposition, plaintiff contended her suit was timely filed because the one-year limitations period is tolled during the time that an "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (Code Civ. Proc.,[2] § 340.6, subd. (a)(2).) Specifically, plaintiff argued defendants never notified her they were ending the attorney-client relationship and further contended her own representations to Bohen that she was proceeding in pro per were false and made simply to prevent Bohen from running up plaintiff's legal expenses by contacting Masserman—contacts for which he would then bill plaintiff. In plaintiff's view, defendants continued to provide representation within the meaning of the statutory tolling provision until July 2015.

At the hearing on defendants' summary judgment motion, plaintiff proffered an unbriefed argument in opposition, namely, that continued representation could be established by continued retention of client retainer funds under *M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602 (*M'Guinness*) and defendants still had possession of such funds (the aforementioned $1,146.19 credit on her account that Masserman previously offered to return). The trial court continued the summary judgment hearing to give the parties an opportunity to brief this issue.

Following supplemental briefing and argument, the trial court granted summary judgment for defendants. The court found the attorney-client relationship ended no later than March

---

[2] Undesignated statutory references that follow to the Code of Civil Procedure.

26, 2014, when plaintiff emailed Bohen to tell her she was proceeding in pro per, and further found defendants' subsequent communications with plaintiff did not constitute continuing representation. The trial court additionally held that *M'Guinness* was not controlling and, in any event, defendants' retention of client funds did not support plaintiff's continuing representation argument because defendants attempted to return the funds.

II. DISCUSSION

We hold the attorney-client relationship between plaintiff and defendants ended in April 2014, over a year before plaintiff filed suit on October 30, 2015, and did not thereafter continue for purposes of tolling the applicable one-year statute of limitations. By the end of April, plaintiff had informed Bohen she was representing herself, retrieved her file from defendants, and told Masserman she needed from him a notice of withdrawal as counsel. Although Masserman did not file a notice of withdrawal in court until several months later, that is immaterial: plaintiff had the right to end the relationship unilaterally—as the retainer agreement she signed expressly recognized—and her conduct demonstrated she did so. In the weeks thereafter, Masserman sporadically communicated with plaintiff and even performed some minimal tasks at her request, but these actions were performed without charge and undertaken in the context of his repeated reminders that he was no longer her lawyer and plaintiff had taken over her own case. Even in the light most favorable to plaintiff, no reasonable jury could find this post-termination conduct constituted continued representation. Likewise, plaintiff's tolling argument predicated on *M'Guinness* also fails to establish a triable issue of fact: there is no

substantial evidence on which a jury could rely to find the credit discovered after an audit of plaintiff's account was an advance payment for ongoing legal services.

A. Principles of Appellate Review from Summary Judgment

Summary judgment is proper where it appears no triable issues of material fact exist and judgment is warranted as a matter of law. (§ 437c, subd. (c); *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) As the moving party, the defendant must show "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The moving defendant "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [the defendant] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*; see also *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 [the plaintiff opposing summary judgment must produce "substantial responsive evidence" sufficient to establish a triable issue of material fact] (*Sangster*).)

On appellate review, we "independently examine[ ] the record and consider[ ] all of the evidence set forth in the moving

and opposing papers except that as to which objections have been made and sustained." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) We view the evidence and all inferences "reasonably drawn therefrom" in favor of the party opposing summary judgment. (*Aguilar*, *supra*, 25 Cal.4th at p. 843; see also *Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 6 Cal.App.5th 443, 459 [speculation is different from an inference and cannot be used to defeat a motion for summary judgment].) "Although the trial court may grant summary judgment on one basis, this court may affirm the judgment on another[;] . . . it reviews the ruling, not the rationale." (*Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.)

B. The Statute of Limitations, and Tolling Based on Continuing Representation

Section 340.6, subdivision (a) provides that "[a]n action against an attorney for a wrongful act or omission, other than actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." Defendant does not dispute that she discovered, or should have discovered, the alleged problems with defendants' advocacy and billing practices more than one year before she filed this lawsuit, but she contends a provision in section 340.6 requires tolling of the one-year limitations period such that her lawsuit was timely.

That tolling provision, subdivision (a)(2) of section 340.6, provides the one-year limitations period is tolled so long as "[t]he

attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." This continuing representation rule applies "even if the client is aware of the attorney's negligence." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 926 (*Laclette*).) As our Supreme Court has explained, the continuing representation rule "was adopted in order to 'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.)

Section 340.6, subdivision (a)(2) itself "does not say when a representation is discontinued." (*Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1170 (*Hensley*).) Precedent holds, however, that "[a]fter a client has no reasonable expectation that the attorney will provide further legal services . . . , the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end." (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 31.) We therefore analyze whether the circumstances, viewed objectively from the client's perspective, establish the existence of a continued attorney-client relationship. (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 ["The standard is as follows: 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship'"]; *Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031,

1039; see also *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887 ["An objective standard is used to determine whether an attorney's representation has been continuous"].)

C. A Reasonable Person in Plaintiff's Position Could Not Believe Defendants Continued to Represented Her After April 2014

The undisputed evidence establishes the relevant circumstances for the objective inquiry we undertake. Plaintiff's retainer agreement with defendants states she "may discharge [defendants] at any time" and that "after [defendants'] services are concluded, upon [plaintiff's] request, [defendants] will deliver to [plaintiff plaintiff's] file . . . ." That, of course, is just what occurred: Masserman suggested plaintiff may want to represent herself as a result of a difference of opinion that developed between them, plaintiff told Bohen in March 2014 that "Masserman is no longer my attorney" and she was representing herself, plaintiff requested and received her client file from defendants in early April 2014, and plaintiff told Masserman at the end of April 2014 that she "needed" a notice of withdrawal. Other than sending plaintiff an invoice in September 2014, there is no evidence defendants had any contact with plaintiff or Bohen until October 2014, when Bohen asked defendants to file a notice of withdrawal, defendants complied, and plaintiff emphatically reminded Bohen that Masserman had not represented her for months.

Plaintiff nevertheless offers three arguments in the hope of establishing a trial is needed to decide whether there was continuing representation. She argues a reasonable person in

her position could believe an attorney-client relationship continued to exist through July 2015 because (1) defendants did not provide actual notice that the attorney-client relationship had ended, (2) defendants continued to provide legal advice and other services through July 2015, and (3) defendants held client funds as a retainer for ongoing legal services. As we now explain, each of these contentions is flawed and summary judgment for defendants was proper.

1. Actual notice

Plaintiff contends it was reasonable for her to believe defendants continued to represent her because she "was entitled to rely on [defendants] affirmatively communicating to her when they considered the relationship to be over." The position she takes in this litigation is precisely why commentators recommend attorneys send a closing letter or an end-of-engagement letter when a matter is completed. (See, e.g., 1 Mallen, Legal Malpractice (2019 ed.) Closing letters, § 2:45 [explaining that a closing letter protects attorneys who "later seek[ ] to represent another client adversely to [a] former client" and "provide[s] important evidence" for purposes of the statute of limitations in malpractice cases].) But whether such a closing letter is sent is not dispositive of the question of continued representation.

In *Hensley*, for instance, the Court of Appeal affirmed summary judgment for an attorney on statute of limitations grounds without regard to when the attorney had informed the client in writing that the representation was concluded. In the Court of Appeal's view, the trial court had correctly found the statute of limitations for the plaintiff's malpractice action ran from the date when, following a "'terrible argument'" during

which her attorney "yelled at her to get out of his office," the plaintiff retained replacement counsel. (*Hensley*, *supra*, 13 Cal.App.4th at pp. 1168, 1172.) It did not matter that the plaintiff and the attorney executed a substitution of attorney document about a week later. (*Id.* at pp. 1169, 1172 [indicating the plaintiff signed the substitution of attorney document on November 13, 1989, but "the die was cast and the tolling afforded under . . . section 340.6, subdivision (a)(2) ended" when "[s]he asked [her new attorney] to serve as replacement counsel on November 6, 1989"].)

In the context of this litigation, however, plaintiff maintains that all of her actions that reveal an end to the attorney-client relationship in April 2014 were mere subterfuge. She claims she merely wanted to save money by reviewing the file herself and "presumed, and found[,] [Masserman] was available to [her] as needed for advice and counsel." Putting aside for the moment the issue of whether Masserman in fact continued to provide advice and counsel (which we address *post*), plaintiff identifies no objective basis for her "presum[ption]" that Masserman was so available. Most conspicuously, there is no evidence plaintiff ever discussed such an arrangement with Masserman.[3] She suggests Masserman's response to her request for a copy of his notice of withdrawal was "vague," but it was not. After addressing an unresolved billing dispute, Masserman

---

[3] The trial court sustained an objection to testimony from plaintiff claiming she never told Masserman she would be proceeding in pro per. The evidentiary ruling does not affect our analysis. Even if plaintiff never said this to Masserman, it is still undisputed that Masserman knew she took her file and asked him to file a notice of withdrawal.

wrote, "As for the withdrawal, you have not received it because I did not file it. I have been very busy. Sorry." Masserman did not express surprise at her asking for the notice of withdrawal nor did he indicate he had not filed it because he believed, as plaintiff now asserts, he had transitioned into a role as a "behind the scenes" attorney.[4]

Approaching the same point from a different angle, plaintiff contends defendants were ethically obligated to notify her when their representation ended. Plaintiff's professional malpractice expert opined that because "[d]efendants failed to make it clear to Plaintiff in 2015 that no further or continuing legal representation would be provided to her, the Defendants failed to fulfill their ethical duty to communicate that they [were] not serving in an attorney-client relationship." Even if defendants' conduct did not conform to the standards set forth in the Rules of Professional Conduct, which we do not decide, the Rules of Professional Conduct do not dictate whether plaintiff reasonably believed defendants represented her after April 2014.[5] (See, e.g.,

---

[4] The fact that Masserman closed the email asking plaintiff "how [she] want[ed] to proceed" does not suggest he doubted whether she still wanted him to file the notice of withdrawal. The only reasonable construction of this sentence is that it referred to the unresolved billing dispute.

[5] Plaintiff complains the trial court appears to have disregarded her uncontested expert's opinion that "[b]y undertaking to represent Plaintiff in negotiations with opposing counsel . . . in early 2015, Defendants maintained an attorney-client relationship with Plaintiff, which gave rise to all of the attendant legal and ethical duties that attorneys owe to their clients." But an expert's legal conclusion does not create a triable issue of fact. (*Hass v. RhodyCo Productions* (2018) 26

BGJ Associates v. Wilson (2003) 113 Cal.App.4th 1217, 1227 ["A violation of the Rules of Professional Conduct subjects an attorney to disciplinary proceedings, but does not in itself provide a basis for civil liability"].)

2. Interactions after April 2014

Plaintiff contends that although "the level of Defendants' participation in [her] divorce shifted between 2013 and 2015, the undisputed fact is that they rendered services and provided legal advice through July[ ] 2015." As we explain, not one of the interactions between plaintiff and defendants after April 2014 (or all of these interactions considered together) made it reasonable for plaintiff to believe defendants continued to represent her. There is no evidence plaintiff had further contact with defendants until November 2014, when Masserman sent her his notice of withdrawal. There is also no substantial evidence a "behind the scenes" attorney-client relationship existed.[6]

Cal.App.5th 11, 21, fn. 2 ["generally speaking, courts do not consider an expert's testimony to the extent it constitutes a conclusion of law"]; see also *Innes v. Howell Corp.* (6th Cir. 1996) 76 F.3d 702, 712 [holding the existence of an attorney-client relationship does not hinge upon "the special ethical rules that govern in a unique negligence regime" and remarking that, "[i]ndeed, it would truly be unfortunate if specialized legal knowledge were required for reasonable laypersons to ascertain whether they are actually being represented by counsel"].)

[6] In her declaration, plaintiff said, "Both before receipt of [the] Notice of Withdrawal and after, Mr. Masserman had never refused to assist me regarding my matter or provide me legal advice. In the months before, I had reached out to opposing counsel in an attempt to rectify the judgment's numerous

When plaintiff and Masserman began communicating again in April 2015, Masserman emphasized he was not her attorney and never billed plaintiff for any of the sporadic contacts. When plaintiff copied Masserman into the discussion with Bohen concerning whether the parties had intended to list a particular bill among communal debts in the stipulated judgment, Masserman shared his recollection, invited Bohen to refresh his memory if her recollection differed, and expressed his hope that this would "help[ ] the parties resolve the matter amicably." When Bohen said she did not recall discussing the bill, Masserman said he would follow up but explained he was "at somewhat of a disadvantage" because plaintiff took her file when she "took over her case." As Masserman made abundantly clear by his arm's-length reference to "the parties" and his emphasis that plaintiff had taken over her case, his role in this exchange was merely akin to that of a witness.

---

omissions that Mr. Masserman admitted were due to his error. He continued to advise me regarding various post-judgment issues and advised me regarding a visitation proposal recently offered by my ex-husband's opposing counsel [*sic*]." With respect to the period between April 2014 and the filing of the notice of withdrawal, it is not clear how plaintiff's "reach[ing] out to opposing counsel" involved Masserman. With respect to the period between Masserman's filing of the notice of withdrawal and April 2015, plaintiff's conclusory statement that defendants "continued to advise" her—without any information about what defendants said or when they said it—is not the "substantial responsive evidence" (*Sangster*, *supra*, 68 Cal.App.4th at pp. 162-163) plaintiff was obligated to produce to create a triable issue of fact as to whether plaintiff reasonably believed defendants continued to represent her.

Later, when plaintiff contacted Masserman again with documentation that certain debt information was sent to Bohen prior to the stipulated judgment, Masserman responded that although he understood "litigating this matter yourself may be difficult," he no longer represented plaintiff. He mentioned his previous email and a follow-up conversation he had with Bohen, but emphasized that Bohen had no interest in negotiating with him because he was not plaintiff's attorney. He "encourage[d] [plaintiff] to explore" a settlement that Bohen had earlier proposed, in part because "[plaintiff's] time is more valuable" than the sums at issue—not because she might incur legal fees greater than the sums at issue. When plaintiff sent Masserman three more emails over the next several weeks, Masserman conceded he had "emailed and spoken with [Bohen] on a few occasions," but refuted plaintiff's reference to an "agreement" by emphasizing he had done so "as a courtesy" to her.

The fact that plaintiff believed she was entitled to make uncompensated requests of Masserman almost a year after she declared he was no longer her attorney and decided to represent herself does not create a triable issue as to whether that belief was reasonable. Although the passage of time without contact is not alone sufficient to extinguish an attorney-client relationship for purposes of the continuing representation rule (see, e.g., *Laclette*, *supra*, 184 Cal.App.4th at pp. 928-929 [relationship survived "lack of contact" over two-year period]), plaintiff made an unmistakable break with defendants and proceeded to litigate her case without any input from them for almost a year.[7]

---

[7] Plaintiff contends the trial court erred in sustaining objections to testimony that she took an unusually active role in her case from the beginning, which would provide context for her

In addition, Masserman's response to historical questions about the parties' negotiation of the stipulated judgment does not suggest he had been providing or was available to provide plaintiff legal advice—particularly when he emphasized she had taken over her own case. (See *Hensley*, *supra*, 13 Cal.App.4th at p. 1173 [holding that an attorney's sending previously-drafted document to opposing counsel and "simultaneously inform[ing] [opposing counsel] that he had been discharged" could not "have induced [his former client] to view the moribund relationship as continuing and deterred her from pursuing her malpractice remedy"].) Masserman's consistent reminders to both plaintiff and Bohen that he no longer represented plaintiff precludes a finding of any reasonable belief to the contrary.

3. Retained client funds

Plaintiff contends the fact that she still had a credit of $1,146.19 with defendants when she filed this lawsuit creates a triable issue as to whether the representation continued beyond April 2014. Plaintiff relies on *M'Guinness*, *supra*, 243 Cal.App.4th 602 in which the existence of an attorney-client relationship was litigated in the context of a disqualification motion. (*Id.* at p. 608.)

In *M'Guinness*, one shareholder sued a corporation and a fellow shareholder; when the defendant shareholder retained a law firm that had represented the corporation for several years, the plaintiff and others moved to disqualify the firm.

---

lack of contact with defendants after April 2014. Even if we were to consider this testimony, the fact that she was highly involved in her case before April 2014 does not change the fact that she handled the case on her own after April 2014.

(*M'Guinness*, *supra*, 243 Cal.App.4th at pp. 607-608.) A threshold issue was whether the corporation was a current client of the firm (in which case the firm's disqualification would be automatic) or a former client of the firm (in which case the firm would be disqualified only if there was a substantial relationship between the two matters). (*Id.* at pp. 614-615.) The Court of Appeal identified several factors that demonstrated the corporation was a current client: "(1) the specific terms of the client agreement, (2) the Law Firm's retention of [the corporation's] funds in the Firm's trust account, (3) the Law Firm's billing practices with respect to [the corporation], (4) the Law Firm's actions up through at least April 2013, and (5) the law addressing an attorney's role as counsel for a corporation." (*Id.* at p. 617.)

Plaintiff seeks to import *M'Guinness*'s holding for use in the section 340.6, subdivision (a)(2) continuing representation context. Even if that is proper, none of the *M'Guinness* factors—including retention of client funds—suggests plaintiff reasonably believed defendants represented her after April 2014.

The client agreement at issue in *M'Guinness* said the firm would provide "'[a]dvice and representation concerning [the corporation] and other general legal work directed by you from time to time.'" (*M'Guinness*, *supra*, 243 Cal.App.4th at p. 618.) The *M'Guinness* court emphasized there was "no evidence [the corporation] terminated its relationship with the Law Firm at any time." (*Ibid.*) By contrast here, as we have already explained, plaintiff terminated the attorney-client relationship when she said she was proceeding in pro per, retrieved her file, and asked defendants for a notice of withdrawal.

In addition, the law firm in *M'Guinness* held funds pursuant to a client agreement that referred to the funds as a "'retainer . . . [that would] be applied to legal fees and expenses incurred on [the corporation's] behalf'" and provided that, "'[a]t the conclusion of our engagement, . . . [the corporation's] funds or property in [the Firm's] possession' would be delivered to [the corporation]." (*Id.* at p. 619.) Here, by contrast, plaintiff does not dispute Masserman's characterization of the retained funds as "a credit . . . based upon [defendants'] audit of the billing last year at [plaintiff's] request" in a May 2015 email. In other words, plaintiff overpaid for services rendered. Even if it is not clear why defendants did not promptly return the money,[8] nothing in the record suggests the money was not disbursed because it was intended as a retainer to guarantee availability for future legal services.

Furthermore, the law firm in *M'Guinness* continued to send regular invoices to the corporation for at least seven months after it claimed the representation ended. (*M'Guinness*, *supra*, 243 Cal.App.4th at p. 620.) Here, plaintiff emphasizes she received an invoice after April 2014, namely one in September 2014. But as reflected in the emails attached to her declaration, she requested the September 2014 invoice because she believed the April 2014 invoice did not reflect some of her payments. Such a request for a restated invoice is not probative of a continued attorney engagement in the manner that the seven months of billings in *M'Guinness* were.

---

[8] In his May 2015 email, Masserman indicated defendants "sent [plaintiff] a couple of emails regarding that and heard nothing in return" and asked plaintiff to "[p]lease confirm what address [she] would like the check sent to."

Finally, the Court of Appeal in *M'Guinness* emphasized, among other things, that the plaintiff's attorney twice asked one of the firm's lawyers whether they represented the corporation and did not receive a negative answer. (*M'Guinness*, *supra*, 243 Cal.App.4th at pp. 621-623.) Here, by contrast, both plaintiff and Masserman repeatedly disavowed any attorney-client relationship from at least April 2014 onward.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.